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Davis Vincent Ballard by Duane O. Ballard v. Wes Buist and Ronald Baxter : Answer of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DEC 19 1958

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DEC 19 1958

VINCENT BALLARD,
DUANE O. BALLARD, his
guardian ad litem,

Appellant,

--vs--

S BUIST and RONALD BAXTER,
k/a RONY BAXTER,

Respondents.

Clerk, Supreme Court, Utah

Case No.

8887

ANSWER OF RESPONDENTS

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STATUTES CITED

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| Rule 4 (a) | - Utah Rules of Civil Procedure |
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| Rule 4 (c) | - Utah Rules of Civil Procedure |
| Rule 4 (h) | - Utah Rules of Civil Procedure |
| Rule 15 | - Utah Rules of Civil Procedure |
| Rule 17(a) | - Utah Rules of Civil Procedure |
| Rule 17(b) | - Utah Rules of Civil Procedure |

CASES CITED

ORTEGA vs. SALT LAKE WET WASH LAUNDRY,
156 Pac. 2nd 885.

MISCELLANEOUS CITED

2-15, Sections 1-4, Utah Code Ann. 53

IN THE SUPREME COURT
OF THE STATE OF UTAH

DAVIS VINCENT BALLARD,
by DUANE O. BALLARD, his
Guardian ad litem,

Appellant,

--vs--

WES BUIST and RONALD BAXTER,
a/k/a RONY BAXTER,

Respondents.

Case No.

8887

ANSWER OF RESPONDENTS

Respondents adopt generally appellant's statement of the facts, but must add the following:

A ten day summons was served upon the respondents in Salt Lake City, Utah, while they were on furlough from the United States Navy. The record does not show that a copy

of the complaint was served upon either of the respondents, but that is immaterial as far as this appeal is concerned.

Immediately after the service of the summons, both respondents returned to active duty on their respective ships.

Special appearance was made in said matter for and on behalf of each of the respondents for the purpose only of moving for a stay of proceedings in said matter until such time as a guardian ad litem was appointed for respondents, pursuant to law, and could appear for them in said matter, and also to stay all proceedings so long as respondents are members of the armed forces of the United States of America; that motion was called for hearing by appellant, together with appellant's motion for the appointment of a guardian ad litem (R. 10) for the plaintiff, Davis Vincent Ballard (R.6, 12-22); that at said hearing on the eighth day of April, 1958, counsel for respondents advised

the court that he was appearing specially in support of said motion to stay the proceedings, and, still appearing specially because it now appeared from the allegations of the petition for the appointment of a guardian ad litem (R. 10) that the plaintiff, Davis Vincent Ballard was a minor, further moved the court to quash the summons served upon the respondents and to dismiss the complaint on the grounds that the plaintiff, Davis Vincent Ballard, was a minor and therefore, as a matter of law, incapable of commencing or initiating such an action.

No evidence was introduced except that counsel for appellant called as a witness the writer of this brief and asked the question, "By what authority do you represent the defendants?" (R. 14) Objection to that question was sustained by the court (R.14-15). Respondents' motion to stay the proceedings was granted and no appeal was taken therefrom. The motion to quash the summons and dismiss the complaint was taken under advisement.

Thereafter, on the first day of May, 1958, said motion was granted, from which this appeal was taken.

STATEMENT OF POINTS

POINT 1. The court did not commit error in granting the respondents' motion to quash the summons and dismiss the complaint, nor did the court err in denying the plaintiff's motion to amend the summons.

POINT 2. The court did not commit error in dismissing the complaint and denying plaintiff's right to amend after appointment of a guardian ad litem.

A R G U M E N T

Both points are so related that they will be discussed together. The respondents contend that the plaintiff, Davis Vincent Ballard, was a minor and did not have the legal capacity to sue or initiate a suit, including the service of summons in his own name, and that the service of said summons upon the respondents gave the court no

jurisdiction of the respondents, and that, not having made a general appearance in said matter, the lower court thereafter could not acquire jurisdiction by amending the summons in such a way as to make it appear that said action was commenced by plaintiff's guardian ad litem and thereby obtain jurisdiction of the respondents.

It is submitted that in Utah the common law rule persists that a minor is "non sui juris" and that resolves the issues raised by this appeal. Counsel for appellant has studiously avoided addressing himself to that problem. In determining that question, consideration must be given to the statutes relating to the legal capacity of children, as well as Rules 4 a, b, c, and h; 15; and 17 a and b of the Utah Rules of Civil Procedure referred to by appellant. Consider Chapter 2 of Title 15, Utah Code Ann. 53, entitled, "Legal Capacities of Children." Section 1 describes the period of minority

extending in males to the age of 21 years and the females to the age of 18 years, with the further provision, however, that all minors attain their majority by marriage. Section 2 provides that the minor is bound, not only for the reasonable value of necessities, but also by his contracts, unless he disaffirms within a reasonable time after attaining his majority and restores to the other party all money or property obtained thereby. Section 3 puts a limitation on the right to disaffirm, and Section 4 provides that, when a contract for the personal services of a minor has been made with him alone and those services have been performed, payment which has been recieved in accordance with the terms of the contract is full satisfaction for those services, and the parent or guardian can not recover therefor a second time. The foregoing chapter was originally enacted in 1898.

This court, in the case of ORTEGA vs. THE SALT LAKE WET WASH LAUNDRY, 156 Pac. 2nd, 885, decided in 1945, in discussing Section 4 above, that:

"In the absence of a statute to the contrary, a minor cannot in his own name and right maintain an action in such a contract although the employer is protected against the claims of the parents if he pays the wages to the minor."

and then in effect adopted the common law as indicated by the following language:

"In short, a minor is non sui juris, and cannot in his own name and right exercise options, make binding contracts, or maintain or prosecute a claim or action for wages or injuries."

It is submitted that Rule 17 b of the Utah Rules of Civil Procedure supports that view by providing that an infant must appear either by his general guardian or guardian ad litem, and provides a very simple method for the appointment of a guardian ad litem to perform the functions of what was described at the common law as the "next of friend."

C O N C L U S I O N

Davis Vincent Ballard, a minor, being non sui juris, could not commence or maintain an action in his own name, and, therefore, the service of summons by the said Davis Vincent Ballard and the filing of the complaint gave the lower court no jurisdiction over the respondents, and, since neither have made a general appearance in said matter thereby voluntarily submitting to the jurisdiction of the court, the lower court did not err in quashing the summons and dismissing the complaint as it did.

Respectfully submitted,

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